

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

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JANE ROE; PRESCHOOLER II,

Plaintiffs,

vs.

THE STATE OF NEVADA; STATE OF  
NEVADA DEPARTMENT OF EDUCATION;  
KEITH RHEAULT; CLARK COUNTY  
SCHOOL BOARD OF TRUSTEES; CLARK  
COUNTY SCHOOL DISTRICT; CARLOS  
ARTURO GARCIA; CHARLENE A. GREEN;  
MICHAEL S. HARLEY; KAY DAVIS;  
DARRYL WYATT; KATHLEEN LISANTI,

Defendants.

Case No.: 2:04-cv-00348-RLH-PAL

**ORDER**

(Motions in Limine—##105, 107, 109;  
Motion for Judgment on the Record—#106;  
Motions for Summary Judgment—##108,  
110, 111, 112, 113)

Before the Court is Defendants Clark County Board of Education, Clark County School District, Carlos Arturo Garcia, Charlene A. Green, Michael S. Harley, Kay Davis, Darryl Wyatt, and Kathleen Lisanti's **Motion in Limine to Exclude Expert Testimony of Stanton Smith** (#105), filed July 19, 2007. The Court has also considered Plaintiff Jane Roe and Preschooler II's Opposition (#115), filed under seal on August 6, 2007, and Defendants' Reply (#125, sealed exhibits #126), filed August 15, 2007.

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Also before the Court are Defendants' **Motion for Judgment on the Record on Plaintiffs' First Claim for Relief (#106), Motion in Limine to Exclude Testimony of Dr. Stephen Luce (#107), Motion for Summary Judgment on Plaintiffs' Sixth and Seventh Claims for Relief (#108), Motion in Limine to Preclude the Testimony of Certain Witnesses Disclosed by Plaintiffs (#109), Motion for Summary Judgment on Plaintiffs' Fourth Cause of Action (#110), Motion for Summary Judgment on Plaintiffs' Eighth Cause of Action (#111), Motion for Summary Judgment as to Plaintiffs' Entitlement to Compensatory Damages under Plaintiffs' Second and Third Claims for Relief (#112, Errata #114), and Motion for Summary Judgment on Plaintiffs' Fourth and Fifth Claims for Relief (#113)**, all filed July 23, 2007.

The Court has also considered Plaintiffs' corresponding Oppositions (#121, Errata #148; #116; #117; #124; #120; #118; #119; #123), filed under seal on August 10, 2007, and Defendants' respective Replies (#132, sealed exhibits #133, #136; #129; #137, sealed exhibits #138; #130; #134, sealed exhibits #135; #141, sealed exhibits #142; #139, sealed exhibits #140; #143, sealed exhibits #144), filed August 24, 2007.

The Court has also considered Plaintiffs' **Statement of Material Facts** (#122, Errata #147), filed under seal on August 10, 2007, and Defendants' Response to Plaintiffs' Statement of Material Facts (#145, sealed exhibits #146), filed August 24, 2007.

## **BACKGROUND**

This case involves allegations that a special education teacher at the Betsy Rhodes Elementary School ("Rhodes Elementary") verbally and physically abused a four-year-old autistic child, anonymously named Preschooler II ("Preschooler"), during the 2002–2003 school year. Plaintiff Jane Roe brings the current action on behalf of herself and Preschooler.

### **I. Factual Background**

Due to his autism and other conditions, Preschooler is eligible for special education services under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 et

1 seq., including free appropriate public education (“FAPE”) to address his special needs.  
2 Appropriate education under this statute includes an individualized education program (“IEP”) for  
3 the child. To effectuate the IEP, Defendant Clark County School District (“School District”)  
4 convened a meeting regarding Preschooler on March 21, 2002. Two additional meetings were  
5 held during the 2002–2003 school year. Roe was present at all meetings.

6 The IEP designed for Preschooler consisted of both a school and a home  
7 component. The school component consisted of full-time placement in a special education pre-  
8 school program known as Kids Intensive Delivery of Services (“KIDS”). The classroom was  
9 staffed by one teacher, Defendant LiSanti, and various teacher’s aides. The home component  
10 consisted of twenty hours per week of intensive one-on-one, in-home instruction to be carried out  
11 by representatives from the Lovaas Institute for Early Intervention (“LIFE”), a special education  
12 home service provider approved by the School District. Roe requested the hours of the home  
13 component be increased but was denied this request.

14 Preschooler began his IEP’s school component on August 29, 2002. Shortly  
15 thereafter on September 24, 2002, LiSanti suffered a heart attack and was thereafter absent until  
16 October 17, 2002. During her absence, various substitute teachers staffed the classroom. The  
17 home component began in January 2003. That spring, Roe was contacted by principal Darryl  
18 Wyatt (“Wyatt”) regarding an investigation of LiSanti based on allegations of mistreatment of  
19 Preschooler. The allegations generally included slapping, hitting, and slamming Preschooler, as  
20 well as force-feeding him and making him walk barefoot from the school bus to the classroom.  
21 Preschooler was then removed to a different elementary school.

## 22 **II. Procedural Background**

23 In addition to substantive guarantees, the IDEA contains certain procedural  
24 safeguards. In particular, it allows the child’s parent to bring a complaint about any matter relating  
25 to the identification, evaluation or educational placement of the child, or provision of FAPE.  
26 When a complaint is made, the child’s parents are entitled to an impartial due process hearing. If

1 unsatisfied with the result of the hearing, the parents may appeal the results through a civil action  
2 in state or federal court. IDEA, 20 U.S.C. § 1415.

3           Following the allegations of mistreatment of Preschooler, Roe initiated a due  
4 process hearing beginning June 17, 2003. On October 10, 2003, the State Hearing Officer Ann  
5 Padover ("Hearing Officer") issued a decision concluding that: (1) Preschooler was denied FAPE  
6 during the time LiSanti was absent from the classroom because the substitutes failed to implement  
7 Preschooler's IEP; (2) there was no need for a specific behavior plan for Preschooler; (3) the  
8 denial of Roe's request for additional home instruction did not result in a denial of FAPE; and (4)  
9 the evidence did not show that the mistreatment incidents interfered with Preschooler receiving  
10 FAPE. Roe appealed to the State Review Officer pursuant to IDEA.

11           State Review Officer Joyce Eckrem ("Review Officer") reviewed the record and  
12 issued a decision on February 23, 2004, finding that: (1) the Hearing Officer properly excluded  
13 evidence on the issue of whether the enforcement provisions of Nev. Rev. Stat. § 388.521 et seq.  
14 (Use of Aversive Intervention, Physical Restraint and Mechanical Restraint on Pupils with  
15 Disabilities) had been violated, as they are not standards of the state educational agency within the  
16 meaning of IDEA; (2) sufficient evidence regarding the alleged incidents of mistreatment was  
17 introduced to determine whether or not the alleged incidents resulted in a denial of FAPE; (3) the  
18 IEP goals were measurable and did not result in denial of FAPE; (4) the Hearing Officer erred in  
19 finding that there was no need for a specific behavior plan, and the lack of such a plan resulted in  
20 infringement of the parents' right to participate in IEP and was therefore a denial of FAPE; and (5)  
21 the Hearing Officer was correct in determining that a program providing Preschooler with thirty  
22 hours of classroom education and twenty hours of at-home education was not a denial of FAPE.  
23 The Review Officer also ordered data collection regarding certain maladaptive behaviors that  
24 inhibited learning and, if the data collection warranted, an added thirty minutes of instruction per  
25 week for Preschooler.

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1 Plaintiff thereafter filed the instant action to review the administrative decision and  
 2 assert additional causes of action. The additional claims for relief include: violations of the  
 3 Americans with Disabilities Act and Rehabilitation Act; violations of Preschooler's Fourth and  
 4 Fourteenth Amendments brought under 42 U.S.C. § 1983; assault, battery and use of aversive  
 5 interventions; and negligence. Plaintiffs seek to hold LiSanti, the School District, the Board of  
 6 Trustees, and other school officials liable for LiSanti's conduct. Defendants filed many motions,  
 7 each of which are discussed below.

## 8 DISCUSSION

### 9 I. Motion for Judgment on the Administrative Record (#106)

10 Defendants move for a judgment on the record on Plaintiffs' first cause of action:  
 11 Petition for De Novo Judicial Review; Declaratory and Equitable Relief; Attorneys' Fees. On this  
 12 issue, the Parties dispute whether Plaintiffs should be allowed to supplement the administrative  
 13 record with additional evidence. Plaintiffs argue that certain evidence was improperly excluded or  
 14 unavailable at the administrative hearing. Defendants counter that the evidence is unjustified,  
 15 irrelevant, and cumulative, and that the administrative record is sufficient as is for the Court to  
 16 decide the merits of Plaintiffs' petition for judicial review. As outlined herein, the Court allows  
 17 Plaintiffs to supplement the record.

18 Under the IDEA, on judicial review of an administrative decision, "the court shall  
 19 receive the records of the administrative proceedings, shall hear *additional* evidence at the request  
 20 of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as  
 21 the court determines is appropriate." *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1472 (9th  
 22 Cir. 1993) (citing 20 U.S.C. § 1415(e)(2) (West 1990) (current version at 20 U.S.C. §  
 23 1415(i)(2)(C)) (emphasis added)).

24 The Ninth Circuit interprets "additional" to mean "supplemental." *Id.* at 1472–73  
 25 (citing *Perrin v. United States*, 444 U.S. 37, 42 (1980)). Reasons that a plaintiff may supplement a  
 26 record include "gaps in the administrative transcript owing to mechanical failure, unavailability of

1 a witness, an improper exclusion of evidence by the administrative agency, and evidence  
2 concerning relevant events occurring subsequent to the administrative hearing.” *Id.* at 1473. A  
3 party is not allowed to admit supplemental evidence merely to “repeat or embellish their prior  
4 administrative hearing testimony,” and the reviewing court must remain cautious not to “change  
5 the character of the hearing from one of review to a trial *de novo*.” *Id.*

6 Plaintiffs seek the introduction of a variety of evidence. Prior to turning to the  
7 merits, the Court addresses a preliminary matter. In their Opposition, Plaintiffs oppose a phantom  
8 argument that their request to supplement the record is untimely, even quoting page six of  
9 Defendants’ Motion. Defendants never made such an argument and the Court therefore disregards  
10 it. *See* discussion *infra* Section V.

11 Turning to the merits, Plaintiffs first urge the Court to supplement the  
12 administrative record with the testimony of Stuart Limbert (“Limbert”), one of Preschooler’s  
13 substitute teachers at Rhodes Elementary during LiSanti’s absence. Limbert was unavailable to  
14 testify at the hearing. Allegedly, Limbert witnessed an incident where a teacher’s aide picked up  
15 Preschooler and threw him. To determine the credibility of this allegation, the Hearing Officer  
16 weighed the testimony of four witnesses, two aides and two parents, ultimately believing the aides’  
17 version of events in concluding that the incident did not occur. Plaintiffs argue here that the  
18 Hearing Officer discounted the parents’ testimony due to a lack of corroborating evidence.  
19 Plaintiffs quote the Hearing Officer as opining that “while the parents of the other child provided  
20 credible testimony about the incident, once again none of these allegations were corroborated by  
21 other witnesses.” (Opp’n, Dkt. 121, 11–12) (citing Defs.’ Mot., Dkt. 106, Ex. A, Decision of  
22 Hearing Officer, p. 32[sic].) Not only can the Court not find a page 32 of the Hearing Officer’s  
23 decision (the decision is twenty-four pages long) or the quotation cited by Plaintiffs, it further  
24 cannot find any reference by the Hearing Officer to a lack of corroboration as a basis for her  
25 credibility determination. *See* discussion *infra* Section V. Rather, the Hearing Officer said the  
26 parents’ testimony contained too many inconsistencies. (Decision of Hearing Officer, 16, 21.) In

1 any event, Limbert testified in his deposition that he does not recall the specific event. For these  
2 reasons, Limbert's testimony will not be admitted. *See Amanda J. v. Clark County Sch. Dist.*, 267  
3 F.3d 877, 888 (9th Cir. 2001) (the credibility of witnesses is generally a decision for the hearing  
4 officer).<sup>1</sup>

5 Next, Plaintiffs request inclusion of evidence regarding Defendants' compliance  
6 with state and school district reporting regulations pertaining to the use of aversive interventions.<sup>2</sup>  
7 The Hearing Officer disallowed such evidence and the Court follows suit, finding that Defendants'  
8 compliance or noncompliance with the reporting statute is irrelevant in determining whether  
9 Preschooler was denied a FAPE. However, Plaintiffs also assert that Defendants failed to disclose  
10 two Aversive Intervention Reports and one Corrective Action Report containing evidence of  
11 improper behavior interventions. Because the reports are relevant and were not made available to  
12 the Hearing Officer, the Court allows them to supplement the record.

13 And last, Plaintiffs seek to introduce evidence of events that occurred subsequent to  
14 the administrative hearing, particularly an email sent by the school administrator that references  
15 abuse of three separate children and a police report containing similar incidents. Plaintiffs claim  
16 that the documents were not disclosed at the hearing. Because the Court finds them relevant, the  
17 Court will allow them into evidence. While Defendants contend that the evidence is cumulative,  
18 the Court will consider that factor when conducting its own review of the evidence.

19 Because the Court allows Plaintiffs to supplement the record with additional  
20 evidence, *see also* discussion *infra* Section II.A, the Court denies Defendants' Motion for  
21 Judgment on the Record at this time. Defendants may resubmit their motion with briefing that  
22 discusses the additional evidence.

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24 <sup>1</sup> Plaintiffs incorrectly cite to the predecessor case, *Amanda J. v. Clark County Sch. Dist.*, 260 F.3d 1106 (9th Cir. 2001) (opinion withdrawn).

25 <sup>2</sup> An "aversive intervention" includes, among other things, the use of corporeal  
26 punishment, including "the intentional infliction of physical pain, including, without  
limitation, hitting, pinching or striking." Nev. Rev. Stat. §§ 388.5212, 388.5225.

## II. Motions in Limine

### A. Expert Testimony of Dr. Stephen Luce (#107)

Relating to the supplementation of the administrative record, Defendants move to exclude the expert testimony of Dr. Stephen Luce. Following the Review Officer's decision, Plaintiffs hired Dr. Luce to provide two written expert opinions on educational standards and programming for teaching children with autism. Dr. Luce's first opinion addressed the appropriateness of both the procedures in place at Rhodes Elementary and the behavioral recommendations in Preschooler's IEP. His second opinion concluded that a "shadow aide" should accompany Preschooler to classroom and other educational events for the full duration of Defendants' responsibility under the IDEA (*i.e.*, until Preschooler is twenty-two years of age). Defendants move to exclude this evidence on the basis that it pertains only to Plaintiffs' first cause of action and, if admitted, would obscure the dispositive issue before this Court on administrative appeal, namely whether the Hearing Officer's decision is supported by the evidence in the record. Defendants further argue that Plaintiffs have not presented sufficient justification for why the evidence was not admitted during the administrative hearing.

The Court finds that Dr. Luce's testimony or expert reports are not admissible to supplement the administrative record. Essentially, Dr. Luce's reports are a post-hoc review of the Hearing Officer's decision, a task that is charged to this Court. IDEA, 20 U.S.C. § 1415(i)(2). Additionally, Plaintiffs present no argument why Dr. Luce did not testify in the underlying hearing, as his opinions would certainly have been relevant at that time.

Defendants further assert that Dr. Luce's reports and testimony should be at trial on Plaintiffs' remaining causes of action. Specifically, Defendants contend that his opinions are limited in scope to those issues presented in the appeal. Plaintiffs vaguely respond that Dr. Luce provides relevant testimony relating to Defendants' alleged failure to train as alleged in their 42 U.S.C. § 1983 action. As discussed below, the Court finds that Plaintiffs have not presented

1 sufficient evidence to sustain their failure to train claim and thus Dr. Luce's testimony is  
 2 foreclosed from introduction at trial. *See* discussion *infra* Section III.B.2.

### 3 **B. Expert Testimony of Dr. Stanton Smith (#105)**

4 Turning away from the issues surrounding the administrative hearing to Plaintiffs'  
 5 remaining claims for relief, Plaintiffs allege in their Amended Complaint that Preschooler suffers  
 6 from post-traumatic stress disorder ("PTSD") as the result of the mistreatment received at Rhodes  
 7 Elementary. Plaintiff's expert, Dr. Smith, made the diagnosis. Defendants move to exclude Dr.  
 8 Smith's testimony on the basis that he employed an unreliable methodology in his diagnosis.  
 9 According to the Diagnostic and Statistical Manual of Mental Disorders, 4th ed. ("DSM-IV"), a  
 10 diagnosis of PTSD is appropriate under a four-factor cluster test if a certain number of symptoms  
 11 from each of the four clusters is present in the patient. There also exists a proposed modification  
 12 to the DSM-IV as applied to children and which includes a fifth cluster. In diagnosing Preschooler  
 13 with PTSD, Dr. Smith's report does not mention the DSM-IV factors.

14 Federal Rule of Evidence 702 renders scientific expert testimony admissible if: "(1)  
 15 the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable  
 16 principles and methods, and (3) the witness has applied the principles and methods reliability to  
 17 the facts of the case." The Supreme Court charges a trial court with the "task of insuring that an  
 18 expert's testimony rests on reliable foundation and is relevant to the task at hand." *Daubert v.*  
 19 *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993). In making this determination, a court  
 20 considers: (1) whether a theory or technique in question has been or can be tested, (2) whether the  
 21 theory or technique has been subjected to peer review and publication, (3) the known or potential  
 22 rate of error of the particular theory or technique and whether means exist for controlling its  
 23 operation, and (4) the extent to which the theory or technique has been accepted. *Id.* at 592–94.  
 24 However, "the inquiry envisioned by Rule 702 is, we emphasize, a flexible one." *Id.* at 595. The  
 25 *Daubert* factors "may or may not be pertinent," and it will depend "on the nature of the issue, the  
 26 expert's particular expertise, and the subject of his testimony." *Kumho Tire Co. v. Carmichael*,

1 526 U.S. 137, 150 (1999). Upon reviewing Dr. Smith's reports and testimony, along with  
2 Defendants' rebuttal experts Dr. Derek Allan Ott and Dr. Roxy Szeftel, the Court denies  
3 Defendants' Motion in Limine at this time.

4 Dr. Smith asserts in his evaluation report of Preschooler that "[t]here is growing  
5 evidence that the DSM-IV-TR criteria is not adequate to diagnose PTSD in young children."  
6 (Opp'n, Dkt. 115, Ex. 1, Smith Dep.; Ex. 2 Smith Rpt.) Defendants' experts appear to support this  
7 proposition. First, Dr. Ott states in his deposition that the DSM-IV criteria need not always be  
8 strictly applied in diagnosing children because they may not exhibit the same manifestations as  
9 adults, as the criteria were developed for soldiers in combat. (Opp'n, Ex. 4, Ott Dep. 51:2–15.)  
10 Next, Dr. Szeftel acknowledges that increased aggressive behavior may be a component of PTSD  
11 in children (Opp'n, Ex. 5, Szeftel Dep. 88:21–89–21), even though it is not listed in the DSM  
12 criteria under either the four- or five-factor test. (*See* Mot., 5–8) (discussing the DSM-IV tests.)

13 Dr. Smith partially relied on the alleged increase in Preschooler's aggressive  
14 behavior in diagnosing the disorder. He explains that the significance of deviating from the DSM-  
15 IV criteria in diagnosing autistic children is due to an autistic child's inability to effectively  
16 communicate like other children. (Smith Dep. 195:3–19.) The Ninth Circuit has found, in a case  
17 discussing the diagnosis of PTSD based on the same methodology, that "a variance from the  
18 DSM's diagnostic criteria will not automatically result in an unreliable diagnosis." *S.M. v. J.K.*,  
19 262 F.3d 914, 921 (9th Cir. 2001). Such may be the case here. Dr. Smith has extensive  
20 experience in working with autistic children and acknowledges that no literature exists on  
21 diagnosing PTSD in autistic children. More important however, Defendants never questioned Dr.  
22 Smith about the DSM-IV factors during his deposition. Thus, Defendants' argument that Dr.  
23 Smith "conceded" and "disclosed" that he did not employ the DSM-IV test is a  
24 mischaracterization of the evidence. Nor does there appear to be questioning regarding Dr.  
25 Smith's expertise in the area of PTSD. In short, Defendants have not convinced this Court that Dr.  
26 Smith's diagnosis is unreliable.

Moreover, the fact that Drs. Ott and Szeftel find Preschooler's PTSD misdiagnosed is no basis in itself to disallow Dr. Smith's testimony. Courts are allowed to admit "questionable testimony if it falls within 'the range where experts might reasonably differ, and where the jury must decide among the conflicting views.'" *S.M.*, 262 F.3d at 921 (citing *Daubert*, 509 U.S. at 596). Dr. Smith's testimony falls within that range. As the *S.M.* court notes, "commentators have repeatedly observed [that] 'mental health professionals involved in everyday practice may disagree more than half the time even on major diagnostic categories such as schizophrenia and organic brain syndrome.'" *Id.* (citation and internal quotations omitted).

Defendants further attempt to disqualify Dr. Smith's expert testimony on the basis that his testimony was excluded in a related case involving another student at Rhodes Elementary, Preschooler I. *Doe v. State of Nevada*, No. 2:03-CV-1500 (D. Nev. Dec. 1, 2003) (Hicks, J.) ("Preschooler I"). In Preschooler I, Judge Hicks excluded Dr. Smith's testimony on the grounds that Dr. Smith's only diagnoses of PTSD in autistic children were of Preschoolers I and II, and that he did not rely on the DSM-IV factors or the proposed five-factor test. *Id.*, 2006 WL 2583746 at \*19 (citations omitted). As stated earlier, Defendants never deposed Dr. Smith regarding his alleged lack of reliance on the DSM-IV factors. Further, the fact that his only diagnoses of PTSD in autistic children includes those involved in these two related cases does not necessarily render his diagnosis incorrect. The Court also notes that while Defendants' instant Motion in Limine is nearly identical to the one brought in Preschooler I's case, Plaintiff's current Opposition contains arguments not raised in that case.

For these reasons, Defendants' Motion in Limine is denied. This ruling does not preclude Defendants from further attempts to disqualify him.

Defendants bring one additional motion in limine to exclude various witnesses. For ease of context, the Motion is addressed following the Court's rulings on summary judgment.

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### 1 **III. Motions for Summary Judgment**

2 Summary judgment is proper when “the pleadings, depositions, answers to  
3 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
4 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter  
5 of law.” Fed. R. Civ. P. 56(c). An issue is “genuine” only if there is a sufficient evidentiary basis  
6 on which a reasonable fact finder could find for the nonmoving party, and a dispute is “material”  
7 only if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby,*  
8 *Inc.*, 477 U.S. 242, 248 (1986). The party moving for summary judgment has the burden of  
9 showing the absence of a genuine issue of material fact, and the court must view all facts and draw  
10 all inferences in the light most favorable to the non-moving party. *Blanck v. Hager*, 360 F. Supp.  
11 2d 1137, 1148 (D. Nev. 2005) (citations omitted).

12 In response to a properly submitted summary judgment motion, the burden shifts to  
13 the opposing party to set forth specific facts showing that there is a genuine issue for trial.  
14 *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002). The non-moving party  
15 “may not rely on denials in the pleadings but must produce specific evidence, through affidavits or  
16 admissible discovery material, to show that the dispute exists.” *Bhan v. NME Hosp., Inc.*, 929  
17 F.2d 1404, 1409 (9th Cir. 1991).

18 The Court now turns to Defendants’ summary judgment motions.

#### 19 **A. Assault, Battery, Negligence, Use of Aversive Interventions (#108)**

##### 20 **1. Assault, Battery, and Use of Aversive Interventions**

21 Plaintiffs’ sixth cause of action asserts various intentional torts against Defendant  
22 LiSanti. Defendants claim immunity under Nev. Rev. Stat. § 41.032(2), which provides an  
23 exception to Nevada’s waiver of sovereign immunity for discretionary acts “whether or not the  
24 discretion involved was abused.” The Court finds that this statute does not extend to intentional  
25 torts. In a very recent decision issued by the Nevada Supreme Court, the court observed that §  
26 41.032(2) mirrored the Federal Tort Claims Act (“FTCA”). *Martinez v. Maruszczak*, 168 P.3d

1 720, 727 (Nev. 2007). In so comparing, the court opined that the “purpose of both the FTCA and  
 2 Nevada’s waiver of sovereign immunity is ‘to compensate victims of government *negligence* in  
 3 circumstances like those in which victims of private negligence would be compensated.’” *Id.*  
 4 (citations omitted) (emphasis added). Because the Nevada Supreme Court interprets § 41.032(2)  
 5 to compensate negligence victims, the Court finds the discretionary acts statute inapplicable to the  
 6 intentional torts asserted here.

7           Plaintiffs counter that LiSanti’s alleged intentional acts and violations of Plaintiffs’  
 8 Fourth Amendment violations are actionable under Nev. Rev. Stat. § 41.0334(2), wherein Nevada  
 9 waives immunity for “*any action* for injury, wrongful death or other damage: (a) [i]ntentionally  
 10 caused or contributed by an officer or employee of the state or any of its agencies or political  
 11 subdivisions; or (b) [r]esulting from the deprivation of any rights, privileges or immunities secured  
 12 by the United States Constitution or the constitution of the State of Nevada.” (emphasis added).  
 13 While Defendants argue that this statute applies only to criminal conduct, the Court disagrees by  
 14 way of the legislature’s use of the words “any action.” *See Martinez*, 168 P.3d at 725 (citing *State*  
 15 *v. Silva*, 478 P.2d 591, 593 (Nev. 1970)) (stating that Nevada’s waiver of sovereign immunity is  
 16 broadly construed). This statute is limited however to those actions committed within the scope of  
 17 employment. Nev. Rev. Stat. § 41.03475. Here, the Parties do not dispute that LiSanti’s acts  
 18 occurred within the scope of her employment and thus LiSanti is not immune from any intentional  
 19 tortious conduct found by a jury to have occurred.

20           Plaintiffs also assert *respondeat superior* liability against the School District for  
 21 LiSanti’s intentional torts. Where Nevada waives sovereign immunity, “liability [is] determined in  
 22 accordance with the same rules of law as are applied to civil actions against natural persons and  
 23 corporations.” Nev. Rev. Stat. § 41.031. Nevada law holds employers liable for the intentional  
 24 torts of its employees committed within the scope of employment. *Rockwell v. Sun Harbor*  
 25 *Budget Suites*, 925 P.2d 1175, 1179 (Nev. 1996); *Prell Hotel Corp. v. Antonacci*, 469 P.2d 399,  
 26 400 (Nev. 1970). Because the Parties do not dispute that LiSanti’s conduct occurred within the

1 scope of her employment, the School District is subjected to liability. Summary judgment is  
2 therefore denied on Plaintiffs' intentional tort claims.

3 For the same reasons as applied to intentional torts, § 41.0334(2)(b) provides no  
4 immunity for Plaintiffs' claims for violations of Fourth Amendment rights. (providing waiver of  
5 immunity for "any action . . . [r]esulting from the deprivation of any rights . . . secured by the  
6 United States Constitution.").

## 7 **2. Negligence**

8 Plaintiffs' negligence claim against LiSanti and the School District is two-fold.  
9 First, LiSanti was negligent in causing Preschooler bodily, mental, emotional, behavioral and  
10 psychological damage. Second, the School District is liable for her negligence under *respondeat*  
11 *superior* and independently for their negligent hiring, training and supervision of LiSanti.  
12 Through the current motion, Defendants seek immunity only for LiSanti's and the School  
13 District's *respondeat superior* liability under Nev. Rev. Stat. § 41.032(2). As discussed above,  
14 this statute excepts from Nevada's waiver of sovereign immunity any discretionary acts committed  
15 by employees, even if that discretion is abused. § 41.032(2). In the recent *Martinez* decision, the  
16 Nevada Supreme Court adopted a new test for analyzing whether an act falls under the  
17 discretionary act statute, the *Berkovitz-Gaubert* test, appropriately named after two United States  
18 Supreme Court decisions. 168 P.3d at 728–29. Under this two-part test, "to fall within the scope  
19 of discretionary-act immunity, a decision must (1) involve an element of individual judgment or  
20 choice and (2) be based on considerations of social, economic, or political policy." *Id.* at 729.

21 Because this test was adopted subsequent to the Parties' briefing, the Parties did not  
22 specifically address the *Berkovitz-Gaubert* factors. Nevertheless, the Court finds the Parties'  
23 briefs instructive on the first prong. LiSanti's acts in disciplining Preschooler certainly involve an  
24 element of judgment or choice. Where employees must "continually assess the changing situation  
25 and improvise as they proceed[]," the action is discretionary. *Herrera v. Las Vegas Metro. Police*  
26 *Dep't*, 298 F. Supp. 2d 1043, 1054 (D. Nev. 2004) (finding that an officer's act was discretionary

1 when he shot and killed a mentally ill person). *See also Ortega v. Reyna*, 953 P.2d 18, 23 (Nev.  
 2 1998) (state trooper’s decision to stop appellant and take him to jail required the officer to use  
 3 personal judgment); *Maturi v. Las Vegas Metro. Police Dep’t*, 871 P.2d 932, 933 (Nev. 1994)  
 4 (finding that decision to handcuff in front or in back is a judgment call); *Foley v. Taylor*, 695  
 5 So.2d 1196, 1199 (Ala. Civ. App. 1997) (“well-settled Alabama law provides that supervision of  
 6 students is a discretionary act.”). LiSanti used judgment in deciding the manner in which to  
 7 discipline Preschooler and thus the first prong of the *Berkovitz-Gaubert* test is satisfied.

8               Regarding the second prong, immunity attaches for discretionary acts only if the  
 9 discretion used is “of the kind that the discretionary-function exception was designed to shield.”  
 10 *Martinez*, 168 P.3d at 728. Because the *Martinez* decision issued subsequent to the instant  
 11 briefing, the Court will allow the Parties to supplement their briefs to address the second prong of  
 12 the *Berkovitz-Gaubert* test.

13               Further, the Court notes that Plaintiffs’ Opposition delves into the merits of their  
 14 negligent hiring, training and supervision claim. Because the argument falls outside the scope of  
 15 Defendants’ Motion, the Court does not address it here. *But see* discussion *infra* Section III.B.2.  
 16 For these reasons, the Court denies Defendants’ Motion.

## 17               **B. 42 U.S.C. § 1983 and *Monell/Canton* (#110, #113)**

### 18               **1. Defendant LiSanti (#110)**

19               LiSanti moves for summary judgment on Plaintiffs’ 42 U.S.C. § 1983 claim for  
 20 violations of Preschooler’s Fourth and Fourteenth Amendment rights as a result of her alleged  
 21 mistreatment. Though brought under both Amendments, the Ninth Circuit categorized Plaintiffs’  
 22 claim as one under the Fourth Amendment on interlocutory appeal of Defendants’ prior motion to  
 23 dismiss. *Preschooler II v. Clark County Sch. Bd. of Trustees*, 479 F.3d 1175, 1181 (9th Cir. 2007)  
 24 (noting the trend away from the Fourteenth Amendment “shocks the conscious” test in favor of the  
 25 reasonableness test of the Fourth Amendment in school abuse cases). On this claim, the Court  
 26 finds that Plaintiffs have submitted sufficient evidence on which a reasonable jury could find that

1 LiSanti violated Preschooler's Fourth Amendment right to remain free from excessive force at  
2 school. *P.B. v. Koch*, 96 F.3d 1298, 1302–03 (9th Cir. 1996).

3 To support many of their allegations of abuse, Plaintiffs submit a police report from  
4 the Clark County School District Police Department that contains the sworn statements of various  
5 individuals who reported to have witnessed the mistreatment. Because the police report contains  
6 inadmissible hearsay, the Court does not consider this evidence. *Orr v. Bank of Am., NT & SA*,  
7 285 F.3d 764, 773 (9th Cir. 2002) (court may only consider admissible evidence in ruling on a  
8 summary judgment motion). Also inadmissible is any evidence of three incidents where LiSanti  
9 made Preschooler walk barefoot from the bus to the school. The Ninth Circuit ruled that these  
10 allegations, even if proved, would not violate Preschooler's Fourth Amendment rights.  
11 *Preschooler II*, 479 F.3d at 1181. Further, an alleged incident of non-party teacher's aide Peggy  
12 Cravish ("Cravish") "jerking" Preschooler off the floor is likewise inadmissible, as Cravish's  
13 conduct is irrelevant to LiSanti's liability.

14 Turning to the admissible evidence submitted by Plaintiffs to show that LiSanti  
15 used excessive force toward Preschooler, Patricia Been ("Been"), a part-time teacher in  
16 Preschooler's classroom, testified in deposition that she witnessed LiSanti being rough, and  
17 screaming and posturing, and that she roughly grabbed her students by the arm to place them in  
18 timeout. Further, Kathy DeSario ("DeSario"), a teacher's aide, testified that LiSanti once force-fed  
19 Preschooler yogurt with crumpled potato chips by prying his mouth open with her fingers, making  
20 him cry and throw up. According to DeSario, the force-feeding spanned the course of one week.  
21 DeSario also testified that once during "circle time," LiSanti slapped Preschooler. Though no one  
22 witnessed the incident, LiSanti told DeSario and others that she "had to do it," and admonished  
23 them, "You didn't see that girls." And last, a special education administrative specialist, Julie Rae  
24  
25  
26

1 Kaspar, testified that LiSanti once told her that LiSanti disliked autistic children. This evidence,  
2 Plaintiffs conclude, demonstrates a violation of Preschooler's Fourth Amendment rights.<sup>3</sup>

3 While Defendants do not dispute that the incidents happened, they contend that  
4 Plaintiffs have exaggerated the nature of LiSanti's conduct. First, Defendants cite to the  
5 deposition testimony of Plaintiffs' witnesses, DeSario and Been, wherein they both categorize  
6 LiSanti's conduct as inappropriate but not abusive. Next, LiSanti testified that her actions were  
7 not intentional. For example, the incident wherein DeSario claims that LiSanti apologized for  
8 slapping Preschooler, LiSanti explains that she apologized to Preschooler because her hitting him  
9 was unintentional. In defending the force-feeding incident, LiSanti explained that her purpose was  
10 to introduce him to new foods. Defendants submit additional testimony indicating that  
11 Preschooler would continue to smile and laugh following so-called incidents of abuse by LiSanti.  
12 There also exists a dispute between the Parties' whether the slapping incident witnessed by Been  
13 involved Preschooler I or II. And last, to rebut the allegation that LiSanti stated she disliked  
14 autistic children, Defendants offer that she herself is the mother of an autistic child.

15 The Court finds that the discrepancies among the witnesses create a genuine issue  
16 of material fact on whether LiSanti's conduct was unreasonable. As held by the Ninth Circuit on  
17 interlocutory appeal, Plaintiffs allegations, if proven, could establish violations of Preschooler's  
18 constitutional rights. *Preschooler II*, 479 F.3d at 1180–81. Because the Court finds that Plaintiffs  
19 have submitted sufficient admissible evidence on which a reasonable jury could find LiSanti's  
20 conduct toward Preschooler unreasonable, the Court denies summary judgment on this claim.

## 21 **2. School District Defendants (#113)**

22 Presuming Plaintiffs prevail on their constitutional claim, Plaintiffs attempt to hold  
23 the School District and the Board of Trustees liable for Preschooler's constitutional injuries.

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24  
25 <sup>3</sup> The Courts notes that there exists additional admissible evidence of mistreatment of  
26 Preschooler by LiSanti that Plaintiffs have failed to include in their brief, but in the interests  
of justice, the Court considers. (*See e.g.*, Pls.' Stmt. Mat. Facts, Ex. 2, DeSario Dep.  
30:25–31:7 (testifying that LiSanti would cause Preschooler to slap himself).)

1 Plaintiffs' fourth cause of action is a general § 1983 claim against all Defendants, while their fifth  
2 claim asserts a more narrow § 1983 claim under the *Monell/Canton* rubric of negligent training.  
3 Defendants School District, Board of Trustees, Superintendent Garcia, administrative personnel  
4 Green, Harley, and Davis and principal Wyatt bring the instant motion.

5           As succinctly stated by the Ninth Circuit, Plaintiffs claims for supervisory liability  
6 rest on a variety of theories, including the allegations that the "School Officials ratified a custom  
7 that subjected Preschooler to an educational environment in which he was physically and  
8 emotionally abused, in part by failing to train . . . or hire qualified individuals," and "abdicated  
9 their duty to report and discipline LiSanti when they first became aware of the alleged abuse."  
10 *Preschooler II*, 479 F.3d at 1182. Supervisory liability can be imposed if Plaintiffs show that these  
11 Defendants "demonstrated disregard of their responsibilities in hiring, training, supervising,  
12 disciplining and reporting abuses committed by LiSanti." *Id.* at 1183 (relying on *Menotti v. City of*  
13 *Seattle*, 409 F.3d 1113, 1149 (9th Cir. 2005) (stating that "[s]upervisory liability is imposed  
14 against a supervisory official in his individual capacity for his own culpable action or inaction in  
15 the training, supervision, or control of his subordinates, for his acquiescence in the constitutional  
16 deprivations of which the complaint is made, or for conduct that showed a reckless or callous  
17 indifference to the rights of others.")).

18           The Court finds that Plaintiffs have raised a genuine issue of fact sufficient to  
19 maintain their claim on the issue of Defendants' alleged failure to discipline and report abuse. As  
20 discussed below, factual issues remain on Plaintiffs' claim for failure to report, disclose and  
21 remediate allegations of abuse as prescribed by Nevada's reporting statutes, specifically whether  
22 Defendants had knowledge of the abuse and whether they failed to react. *See* discussion *infra*  
23 Sections III.C, D. As discussed in more detail below, Defendants' knowledge of mistreatment of  
24 Preschooler and failure to react and remediate could lead a reasonable jury to find that Defendants  
25 were deliberately indifferent to Preschooler's rights and/or caused some of his injuries. *Id.* Should  
26 Plaintiffs succeed on their deliberate indifference claim, a reasonable jury could find that

1 Defendants “demonstrated disregard of their responsibilities in . . . disciplining and reporting  
2 abuses, ” thereby imposing supervisory liability on the named Defendants. *Preschooler II*, 479  
3 F.3d at 1182.

4           Plaintiffs have not, however, raised a triable issue on Defendants alleged failure to  
5 train or hire qualified teachers. Discussing first the hiring of unqualified teachers, Plaintiffs assert  
6 that LiSanti was neither certified to teach autistic children nor did she receive a waiver of  
7 certification from the State of Nevada as required by law. Thus, their argument concludes LiSanti  
8 should never have been hired. The Court finds that Plaintiffs have failed to show causation  
9 between Preschooler’s injuries and LiSanti’s lack of certification. As submitted by Defendants,  
10 LiSanti has a vast array of education and experience in dealing with autistic children, both  
11 professionally and personally as the mother of an autistic child. She has a both an undergraduate  
12 and Master’s degree in special education, she has also obtained thirty-two credits of education  
13 beyond her Master’s degree, and attended all training offered to her by the School District.  
14 Further, Her formal education included a focus on autism, and all of her in-service training on  
15 behavioral issues and language development addressed children with autism. Additionally,  
16 LiSanti’s career up until the 2002-2003 school year included teaching autistic children. Simply  
17 put, Plaintiffs fail to prove that the mere fact that LiSanti was not certified, she was nevertheless  
18 unqualified for her job. While Plaintiffs ultimately conclude that “a reasonably informed and  
19 trained special education teacher or administrator would not have hired Kathleen LiSanti,” (Opp’n,  
20 Dkt. 123, 15–16), Plaintiffs submit no evidence of any prior inappropriate conduct by LiSanti,  
21 nor do they submit testimony that based on her qualifications and experience LiSanti was  
22 wrongfully or negligently hired.

23           The Court also rejects Plaintiffs’ claim that a failure to properly train LiSanti was a  
24 contributing factor in Preschooler’s injuries. To show that Defendants’ training program was  
25 effective, Plaintiffs discuss Nevada’s statutory Model Positive Behavioral Intervention Plan. Nev.  
26 Rev. Stat. § 388.5285. Plaintiffs emphasize that the statute requires the Board of Trustees to

1 “provide for appropriate training for the members of the staff of the schools within the school  
 2 district.” *Id.* While Plaintiffs assert that Defendants violated this statute, they never explain how.  
 3 Defendants submitted various forms of evidence demonstrating that the School District and the  
 4 Board of Trustees provided training on positive behavioral interventions, best practices related to  
 5 instruction of autistic children, Nevada’s reporting requirements, the School District’s zero  
 6 tolerance policy toward abuse, and students’ rights, yet Plaintiffs never discuss this evidence. Even  
 7 if Plaintiffs evidence can be construed as demonstrating that Defendants’ training program could  
 8 have been improved, Plaintiffs cite no evidence or make any argument that any failure to train was  
 9 the result of “deliberate indifference to the rights of persons with whom the [public employee]  
 10 comes into contact.” *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). Nor do they argue that  
 11 LiSanti’s alleged mistreatment of Preschooler resulted from the shortcomings of a faulty training  
 12 program as opposed to an adequately trained person who made some mistakes. *Id.* at 390–91.

13 Further, it appears that Plaintiffs’ failure to supervise claim raises the same  
 14 arguments as raised in support of their improper training and hiring arguments and thus the Court  
 15 likewise dismisses Plaintiffs’ failure to supervise claim.

16 Because genuine issues of material fact exist surrounding Defendants’ alleged  
 17 knowledge of the mistreatment of Preschooler and their alleged lack of subsequent remediation of  
 18 the problem, the Court denies Defendants’ Motion for Summary Judgment.

### 19 **C. Negligent Failure to Report, Disclose, and Remediate (#111)**

20 Defendants School District, Board of Trustees, LiSanti, Darryl Wyatt (“Wyatt”),  
 21 Charlene Green (“Green”), and Michael Harley (“Harley”) move for summary judgment on  
 22 Plaintiffs’ eighth cause of action for negligent failure to report, disclose and remediate under the  
 23 aversive intervention law, Nev. Rev. Stat. § 388.521 *et seq.*, and the child abuse laws, Nev. Rev.  
 24 Stat. § 432B.010 *et seq.* The aversive intervention statutes state that “[a] person employed by the  
 25 board of trustees of a school district or any other person shall not use any aversive intervention on  
 26 a pupil with a disability.” § 388.5265. An “aversive intervention” includes, among other things,

1 the use of corporal punishment, defined as “the intentional infliction of physical pain, including,  
 2 without limitation, hitting, pinching or striking.” §§ 388.5212, 388.5225. The statutes further  
 3 mandate reporting of any violations “not later than 24 hours after the violation occurred, or as soon  
 4 thereafter as the violation is discovered.” § 388.5295. The child abuse statutes define child abuse  
 5 to include, among other things, “[p]hysical or mental injury of a nonaccidental nature.” §  
 6 432B.020. This section also mandates reporting of such abuse. § 432B.220. Based on these  
 7 statutes, Plaintiffs argue that Defendants’ negligence in failing to report instances of abuse and  
 8 take proper remedial action caused Preschooler’s injuries.

9 As a preliminary matter, Defendants argue that the aversive intervention and child  
 10 abuse statutes cannot form the basis of Plaintiffs’ claim. The Court has already held that violation  
 11 of these statutes can give rise to a claim of negligence per se and contrary to Defendants’  
 12 contention, the Nevada Supreme Court’s decision in *Richardson* does not change this result.  
 13 (Order, Dkt. 24); *Richardson Const. Inc. v. Clark County Sch. Dist.*, 156 P.3d 21, 23 (Nev. 2007).  
 14 The *Richardson* court clarified that a private cause of action cannot be maintained for violation of  
 15 a statute only when the legislature has so expressed. *Id.* Here, Plaintiffs do not assert a cause of  
 16 action under the aversive intervention or child abuse statutes but merely use them in establishing  
 17 certain elements of their negligence claim. *Ashwood v. Clark County*, 930 P.2d 740, 744 (Nev.  
 18 1997) (stating that “[a] violation of statute establishes the duty and breach elements” of a  
 19 negligence action).

20 Turning to the negligence claim, Plaintiffs must prove duty, breach, causation and  
 21 damages. *Sims v. Gen. Tel. & Elecs.*, 815 P.2d 151, 154 (Nev. 1991). Defendants concede that a  
 22 genuine issue of material facts exists on the duty and breach elements but argue that Plaintiffs’  
 23 claim fails for lack of causation and damages. To establish causation, a plaintiff must prove that  
 24 the defendant’s acts were both the actual and proximate causes of his injuries. *Id.* Actual causation  
 25 means that but for the defendant’s negligence, plaintiff would not have been damaged. *Dow*  
 26 *Chem. Co. v. Mahlum*, 970 P.2d 98, 107 (Nev. 1998). Proximate causation limits a defendant’s

1 liability to the foreseeable consequences of his actions. *Id.* Here, Plaintiffs contend that  
 2 Defendants were on notice of the alleged abuse and that a proper reporting scheme and subsequent  
 3 investigation into the allegations would have prevented Preschooler's injuries.

4 To show that but for Defendants' negligence, Preschooler would not have been  
 5 abused, Plaintiffs first attempt to establish that Defendants were on notice of LiSanti's conduct as  
 6 early as September 2002. The Court rejects this argument. To support their contention, Plaintiffs  
 7 argue that two parents of a fellow student notified both Defendants principal Wyatt and  
 8 Superintendent Carlos Garcia ("Garcia"), that a nonparty teacher's aide, Cravish physically and  
 9 mentally abused Preschooler I. Plaintiffs conclude that a proper investigation into this claim  
 10 would have uncovered LiSanti's abuse and use of aversive interventions. This argument fails not  
 11 only because LiSanti was on medical leave during this time and would therefore be unavailable for  
 12 investigation or observation, but also because the incident is too attenuated to establish causation  
 13 of future abuse involving two entirely separate individuals and incidents.

14 Next, Plaintiffs assert that Defendants were on notice by at least November 2002.  
 15 Plaintiffs assert that in November 2002, teacher's aide Been reported an allegation of LiSanti's  
 16 screaming and posturing over the students to her supervisor, Maureen Powers, Defendant Jackie  
 17 Green ("Green") and Jeff Atkinson ("Atkinson") of the "Low Incidence Team." However, upon  
 18 review of Plaintiffs' submitted evidence, Been testified only that she notified Green.<sup>4</sup> Defendants  
 19 argue that while Been initially testified that she notified Green, Been later changed her testimony  
 20 to state that she notified an unidentified gentleman, possibly Atkinson. The Court finds that the  
 21 inconsistencies in the testimony create a genuine issue of material fact regarding who, when and if,  
 22 Been notified anyone of LiSanti's alleged mistreatment of Preschooler. Further, the Court declines  
 23 to address Defendants' passive argument that any knowledge of mistreatment by Been as reported  
 24

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25 <sup>4</sup> The Court notes that Plaintiffs' Opposition to the instant Motion presents a litany of  
 26 direct quotations from their Statement of Material facts without explanation or argument,  
 sending the Court on a paper chase through Plaintiffs' voluminous record to decipher their  
 evidence and their arguments.

1 to Green or Atkinson cannot be imputed to the named Defendants. Not only does Defendants  
2 argument ignore that Green is a party, it is also made without citing any legal authority.

3           Plaintiffs then argue that Defendants were possibly notified prior to November  
4 2002. For support, they submit the deposition of DeSario, who testified that she notified principal  
5 Wyatt of certain allegations of mistreatment “some time” prior to November 2002 but cannot  
6 recall when. Wyatt testified that DeSario made no report until March or April 2003. Defendants  
7 point out that DeSario later changed her testimony and agreed with Wyatt that she did not come  
8 forth with her complaints until 2003. Defendants request the Court to dismiss DeSario’s  
9 inconsistencies in favor of Wyatt’s testimony that any mistreatment was not reported until March  
10 or April 2003 but the Court is in no position to judge the credibility of witnesses on summary  
11 judgment. Rather, the Court finds that there remains a genuine issue of material fact regarding  
12 when Defendants were put on notice of the alleged mistreatment of Preschooler.

13           Notwithstanding the factual allegations surrounding when Defendants were notified  
14 of Preschooler’s mistreatment, Plaintiffs must next prove that Defendants could have acted to stop  
15 future occurrences. To make this connection, Plaintiffs cite a California case for the proposition  
16 that the failure to investigate or report occurrences of child abuse greatly enhances the chances of  
17 repeated and more severe abuse. *Landeros v. Flood*, 551 P.2d 389 (Cal. 1976). The *Landeros*  
18 case involved a child diagnosed with battered child syndrome. *Id.* In discussing this syndrome,  
19 the court stated that one of the distinguishing characteristics is that the assaults on the child are not  
20 isolated events but rather part of an abusive environment in which the abuse will both continue  
21 and increase. *Id.* at 395. Here, there is no allegation that Preschooler suffered from battered child  
22 syndrome and thus the Court cannot categorically find that a failure to report definitely results in  
23 future acts of abuse. Such a determination is left for the trier of fact that rests on a variety of  
24 circumstances, including whether the claims of abuse were reportable or substantiated.

25 //

1           The Parties dispute the significance of whether the allegations were substantiated.  
2   As Defendants emphasize, Plaintiffs' witnesses described the various incidents of mistreatment as  
3   inappropriate rather than abusive. Further, Wyatt concluded that certain of the allegations were  
4   either unsubstantiated or non-reportable. Plaintiffs contend that unsubstantiated claims of abuse  
5   need be reported, relying on a New York case, *Kimberly S.M. v. Bradford Central School*. 226  
6   A.D.2d 85 (S.D.N.Y. 1996). Plaintiffs' argument is not on point. *Kimberly S.M.* involved whether  
7   a teacher violated a statutory duty to report. *Id.* at 89–91. The court held that a teacher can be held  
8   liable for failure to report even if the abuse allegations are later found unsubstantiated. *Id.* The  
9   current claim is one for negligence. Certainly, whether the abuse allegations were unsubstantiated  
10   impacts whether the failure to report them caused Preschooler's future injuries. If Defendants  
11   found no reportable conduct prior to April 2003 as they contend, their failure to report could not  
12   have caused future occurrences of reportable conduct.

13           Further, the Court notes that Defendants did take certain measures in response to  
14   the allegations of abuse. For example, the evidence shows that the Low Incidence Team was  
15   present in the classroom following Been's report. However, the record is unclear as to the extent,  
16   nature, purpose or outcome of their presence. Without any such evidence, the Court is unable to  
17   evaluate whether Defendants' remedial response to Been's allegation can be found negligent.  
18   Thus, the Court finds there exists many genuine issues of material fact regarding causation.

19           And last, Defendants claim that Preschooler was not damaged by the alleged  
20   mistreatment, arguing that any assaults and batteries suffered are insufficient to satisfy the  
21   damages element of Plaintiffs' negligence claim. The Court disagrees and thus finds that the  
22   alleged assaults and batteries suffered by Plaintiffs are the damages caused by Defendants' alleged  
23   negligent failure to report.

24           Because many genuine issues of material fact exist regarding notification and  
25   causation, the Court denies Defendants' Motion for Summary Judgment.

26   //

1                   **D. Compensatory Damages Under the ADA and RA (#112)**

2                   Plaintiffs’ second and third claims for relief assert violations of the Americans with  
3 Disabilities Act (“ADA”) and the Rehabilitation Act (“RA”) against the School District and the  
4 Board of Trustees. The Court has previously interpreted these claims as premised on Defendants’  
5 alleged failure to respond to allegations of abuse. (*See* Order, Mot. Dismiss, Dkt. 24, 10.)  
6 Defendants move for summary judgment only on the issue of damages. While Plaintiffs devote  
7 much discussion to the merits of their underlying ADA and RA claims, Defendants move only on  
8 the issue of damages and thus the Court declines to address such arguments.

9                   Turning to the issue at bar, under both the ADA and RA, compensatory damages  
10 are available upon a showing of discriminatory intent. *Lovell v. Chandler*, 303 F.3d 1039, 1056  
11 (9th Cir. 2002). To prove discriminatory intent, one must show deliberate indifference, which  
12 “requires both knowledge that a harm to a federally protected right is substantially likely, and a  
13 failure to act upon that likelihood.” *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir.  
14 2001) (citing *City of Canton v. Harris*, 489 U.S. 378, 389 (1988)). A plaintiff proves the first  
15 element by showing that the public entity is on notice that an accommodation is required. *Id.* at  
16 1139. The second element is satisfied when the failure to act “is more than negligent, and involves  
17 an element of deliberateness.” *Id.* (citation omitted).

18                   Regarding the first element of deliberate indifference—whether the public entity  
19 was on notice that an accommodation is required, *id.*—Defendants argue that Plaintiffs have  
20 submitted no evidence that Defendants failed to act upon any reports or allegations of abuse. As  
21 discussed above, *supra* Section III.C.1, many genuine issues of material facts exist surrounding  
22 Defendants’ responses to the reports of abuse and aversions by LiSanti. For example, testimony  
23 exists to show that in response to certain allegations, Wyatt dismissed them as either  
24 unsubstantiated or non-reportable. Because Plaintiffs have submitted evidence showing that  
25 Defendants could have been on notice that Preschooler was being mistreated, they raise a genuine  
26 issue of material fact regarding the first element of deliberate indifference.

Turning to the second element, which requires a defendant's failure to act to involve some element of deliberateness, *id.*, Defendants submit evidence indicated that the School District provides training regarding pedagogical methods, appropriate "best practice" responses to behavioral concerns for all children including disabled children, constitutional, federal, and state rights of all students including disabled students, and state reporting requirements for aversive interventions. Thus, Defendants' maintain, they were not deliberately indifferent to Preschooler's abuse. However, Defendants' argument fails in that it does not address a response to the real issue at hand: whether Defendants deliberately failed to act in response to the allegations of abuse as Plaintiffs contend. The fact that Defendants provided training prior to the occurrences of mistreatment fails to address Plaintiffs' concerns that defendants failed to act in response to the allegations of mistreatment.

Because the Court finds there remains genuine issues of material fact surrounding Defendants' actions or failure to act in response to the abuse and aversive intervention allegations, as well as the timing of the notification, the Court cannot determine as a matter of law that Plaintiffs are not entitled to compensatory damages under the ADA or RA should they succeed in proving the underlying merits of their claims. A reasonable jury could find that Defendants acted with deliberate indifference, especially in light of the extensive training Defendants purport to have given. *Oviatt By & Through Waugh v. Pearce*, 954 F.2d 1470, 1478 (9th Cir. 1991) ("Whether a local government entity has displayed a policy of deliberate indifference is generally a question for the jury."). Summary judgment is therefore denied.

#### **IV. Motion in Limine to Exclude Various Witnesses (#109)**

In light of the foregoing analysis, the Court turns to Defendants' motion to exclude the testimony of the following witnesses: Penny Clark (Clark), Missie Doe's Parents, Chele and Mark Steelsmith ("the Steelsmiths"), Kristi Marlor ("Marlor"), John Leis ("Leis"), Terry Phelps ("Phelps"), Pam Knobel ("Knobel"), Sandra Williams ("Williams"), and Nora Escobedo ("Escobedo"). Defendants characterize these witnesses as disgruntled employees and parents of

1 children enrolled at other elementary schools in the Clark County School District and move to  
2 exclude the testimony on the grounds that certain witnesses were not disclosed until the last day of  
3 discovery, that Plaintiffs failed to disclose contact information for certain witnesses, that the  
4 testimony is irrelevant, and that the testimony is more prejudicial than probative. The Court  
5 addresses the procedural arguments first.

6 Defendants first argue that Parents of Missie Doe, the Steelsmiths, and Marlor were  
7 not disclosed until the last day of discovery. The Federal Rules prevent a party who, without  
8 substantial justification, fails to timely disclose witnesses or information unless such failure is  
9 harmless. Fed. R. Civ. P. 37(c)(1). Plaintiffs also failed to disclose the addresses of Parents of  
10 Missie Doe and Marlor pursuant to Fed. R. Civ. P. 26(a)(3)(A). Further, Defendants claim  
11 Plaintiffs did not disclose the correct address of Escobedo. The Court rejects each argument.  
12 Regarding the late disclosure, discovery ended in November 2005. Since then, Defendants have  
13 sat on their rights to bring any motion to reopen discovery on account of Plaintiffs' last-minute  
14 disclosure. The same rationale applies to reject Defendants' claim that Missie Doe's Parents and  
15 Marlor should be precluded from testifying as a result of Plaintiffs' failure to disclose their's and  
16 Escobedo's contact information. Defendants, until now, gave no indication of their desire to  
17 depose these witnesses, and therefore any prejudice is caused by Defendants' own dilatory  
18 conduct.

19 Turning to the substance of the proposed testimony, Plaintiffs seek the introduction  
20 of evidence to prove that the School District had a custom and practice of failing to train, report,  
21 investigate, correct and remediate child abuse and aversive intervention and to show Defendants'  
22 deliberate indifference toward the fact that Preschooler's federally protected rights were being  
23 violated. Specifically, the witnesses include parents who claim that their children were abused by  
24 various teachers, at various elementary schools in either the 2002–2003 school year or in 2005.  
25 Defendants object on the grounds that incidents of abuse that did not occur in Preschooler's  
26 classroom during the 2002–2003 school year are irrelevant.

1           The Court finds that the proposed testimony is irrelevant to Plaintiffs' claim for  
 2 failure to report, investigate, correct and remediate. In that claim, Plaintiffs assert that but for  
 3 Defendants' failure to act on the allegations of abuse against Preschooler, Preschooler would not  
 4 have suffered future incidents of abuse. Any occurrences of failing to report instances at other  
 5 schools, against other students, by other teachers, and during different academic years is not only  
 6 irrelevant but highly prejudicial to the School District in that it tends to take the form of  
 7 impermissible character evidence. *See U.S. v. Yazzie*, 188 F.3d 1178, 1190 (10th Cir. 1999)  
 8 (discussing the fine line between habit and character evidence).

9           Plaintiffs also attempt to use the proposed evidence to support their claim for  
 10 negligent training. As discussed above, *see* discussion *supra* Section III.B.2, the Court finds that  
 11 Plaintiffs have submitted insufficient evidence on which to sustain their allegations that  
 12 Defendants' failure to train caused Preschooler's injuries. For the foregoing reasons, the proposed  
 13 testimony is inadmissible.

14           Should the evidence come in for any other reason, the Court further precludes the  
 15 following testimony. First, the Court renders inadmissible any testimony regarding the School  
 16 District's alleged retaliation against parents or employees for reporting abuse. Plaintiffs assert no  
 17 claim of retaliation and thus the testimony is irrelevant and prejudicial. Second, the incident  
 18 testified to by Leis regarding the sexual assault of his son by another student is both highly  
 19 prejudicial and irrelevant because the incident occurred at the hands of another student, not a  
 20 School District employee.

21           Further, Plaintiffs argue for the inclusion of witnesses not discussed in Defendants'  
 22 Motion and thus the Court declines to address those arguments.

### 23           **V. Sanctions against Plaintiffs' Counsel**

24           The Court finds it necessary to raise a concern regarding the quality and form of  
 25 Plaintiffs' counsels' briefs. In reading the submissions, the Court struggled to discern the precise  
 26 arguments made therein. Decoding incorrect legal citations and references to the record,

1 overlooking countless typos and incomplete sentences, making sense of undeveloped and  
 2 nonresponsive arguments, enduring single-spaced formatting, and locating pinpoints were just  
 3 some of the frustrations encountered by the Court in ruling on the instant Motions. Not only are  
 4 counsel's deficiencies violative of local briefing rules,<sup>5</sup> they have unnecessarily cost the Court  
 5 considerable time deciphering counsel's arguments, risking both a misunderstanding of Plaintiffs'  
 6 assertions as well as possible injustice to Plaintiffs.

7 Accordingly, the Court finds it necessary to sanction Plaintiffs' counsel in the  
 8 amount of one thousand dollars (\$1,000), made payable to the Clerk of Court within ten (10) days  
 9 from the date of this Order, not only to compensate the Court for valuable time lost but also to  
 10 ensure that future submissions by Plaintiffs' counsel comport with the level of quality expected of  
 11 practitioners, including, but not limited to, compliance with local rules.

#### 12 **VI. Briefing Schedule**

13 To the extent the Court allows supplemental or additional briefing, the submitting  
 14 Party has thirty (30) days from the date of this Order in which to submit their points and  
 15 authorities. The opposing Party thereafter has fifteen (15) days in which to file an Opposition,  
 16 with Replies due eleven (11) days thereafter.

#### 17 **CONCLUSION**

18 Accordingly, and for good cause appearing,

19 IT IS HEREBY ORDERED that Defendants' Motion in Limine (#105) is DENIED.

20 IT IS FURTHER ORDERED that Defendants' Motion for Judgment on the Record  
 21 (#106) is DENIED. Additional briefing and supplementation of the record is allowed as outlined  
 22 above.

23 IT IS FURTHER ORDERED that Defendants' Motion in Limine (#107) is  
 24 GRANTED.

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 26 <sup>5</sup> See e.g., Local Rules 7-2 (points and authorities), 7-3 (citations, including pinpoints and format), 7-4 (length of briefs), 10-1 (formatting), and 10-3 (exhibits).

1 IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment on  
2 Plaintiffs' Sixth and Seventh Claims for Relief (#108) is DENIED. Additional briefing is allowed  
3 on the issue of Defendants' immunity for negligence.

4 IT IS FURTHER ORDERED that Defendants' Motion in Limine (#109) is  
5 GRANTED.

6 IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment on  
7 Plaintiffs' Fourth Claim for Relief (#110) is DENIED.

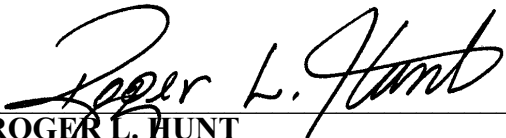
8 IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment on  
9 Plaintiffs' Eighth Claim for Relief (#111) is DENIED.

10 IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment as  
11 to Plaintiffs' Entitlement to Compensatory Damages under Plaintiffs' Second and Third Claims for  
12 Relief (#112) is DENIED.

13 IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment on  
14 Plaintiffs' Fourth and Fifth Claims for relief (#113) is DENIED.

15 IT IS FURTHER ORDERED that Plaintiffs' counsel pay \$1,000 to the Clerk of  
16 Court within ten (10) days from the date of this Order as sanctions for their noncompliance with  
17 local briefing rules.

18  
19 Dated: December 10, 2007.

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22 **ROGER L. HUNT**  
23 Chief United States District Judge  
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